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No. 10-557

Supreme Court, U.S.
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In The

Supreme Court of the United States

WAEL MOHAMED ABDEL-LATIF,

Petitioner,

v.

ERIC H. HOLDER, JR.,
U.S. Attorney General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

JAMES D. LUCAS
Counsel of Record
2316 Montana Avenue
El Paso, Texas 79903
(915) 532-8811
(915) 532-8807 (fax)
Jlucas2@elp.rr.com

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REPLY TO BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, petitioner addresses the following new points raised in the brief in opposition ("brief") filed by Respondent Eric Holder.

I. Respondent's first question for review does not fairly address the substance of Petitioner's first question for review, but rests on grounds which the Supreme Court has expressly stated will rarely result in the grant of review

Supreme Court Rule 24.2 authorizes a respondent to present its own question(s) for review if dissatisfied with the petitioner's question(s). Respondent substitutes the following question as a question for that of Petitioner:

> Respondent's Question #1
>
> "Whether the court of appeals correctly held that substantial evidence supported the determination by the [BIA] that petitioner failed to establish eligibility for withholding of removal under the [INA]"
>
> Petitioner's Question #1
>
> "Whether the United States Court of Appeals for the Fifth Circuit erred in defining the term 'persecution,' as used in 8 U.S.C. §1101(a)(42)(A), to mean harm or suffering done to punish an individual for a belief or characteristic which the persecutor seeks to overcome"

Respondent's first question for review does not fairly address the substance of Petitioner's first question for review and should be disregarded. Because Respondent's question and his brief in general primarily focus on the underlying fact findings in Petitioner's case and how properly stated law should apply, his question also disregards Supreme Court Rule 10, which states that a petition "is rarely granted when the asserted error consists of factual findings or the misapplication of a properly stated rule of law."[1]

II. Respondent's suggestion that "persecution" cannot occur where a single detention occurs over a several hour period and the detained person does not suffer serious bodily injury oversimplifies the meaning of the term "persecution," as used in the INA

In footnote 7 of *I.N.S. v. Stevic*, 467 U.S. 407, at 414 (1984), the Supreme Court observed that "Section 243(h) of the INA of 1952 [was] amended by striking out the words 'physical persecution' and inserting in lieu thereof 'persecution on account of race, religion, or political opinion.'" This amendment clarified that a showing of physical injury is not necessary to prove "persecution" under the withholding of removal and

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[1] As Supreme Court Chief Justice Fred Vinson stated more than sixty years ago, "[t]he Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions." See *Vinson, Work of the Federal Courts, ADDRESS BEFORE THE ABA* (Sept. 7, 1949).

asylum statutes. The conduct of the SSI agents who threatened to torture Petitioner and his family and to arrest Petitioner on bogus drug charges if he did not cooperate with their interrogation procedure by informing them of the activities and identities of members of the Muslim Brotherhood (AR 137-147) represents the sort of extreme conduct that would fall within the definition of "persecution." See e.g. *Nikijuluw v. Gonzalez*, 427 F.3d 115, 120 (1st Cir. 2005); *Guan Shan Liao v. U.S. Dept. of Justice*, 293 F.3d 61, 67 (2nd Cir. 2002); and *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc).

III. Respondent's brief mischaracterizes Petitioner's complaint as that of being persecuted because of political opinion, when the allegations made by Petitioner in his writ petition reflect that his complaint is directed solely to persecution he suffered on account of his membership in the "Muslim Brotherhood"

In his petition (at page 3), Petitioner asserted: "The evidence relied on by the BIA established that Abdel-Latif, a past member of the Muslim Brotherhood, was detained, continually beaten, and threatened for a 12-14 hour period by SSI officers . . . because of his participation in a rally on the Alexandria college campus organized by the Muslim Brotherhood," a peaceful political organization which has for many years been outlawed by the Egyptian Government. Petitioner limited his claim of being "persecuted"

to the protected ground of being a member of a social group known as the Muslim Brotherhood. *Id.* Nowhere in his petition did he assert that he was persecuted based on a political opinion. Even though Respondent acknowledges that Petitioner bases his writ petition on a complaint of persecution based on his past membership in the Muslim Brotherhood (Respondent's brief, page 4), he nonetheless maintains that Petitioner is not eligible for withholding of removal because the record "does not contain any evidence that [Petitioner] was questioned by SSI . . . regarding his political opinions" and because Petitioner "failed to establish a 'nexus' between his mistreatment and his political beliefs." (See Respondent's brief, at p. 11). These arguments by Respondent are not germane to the question presented since Petitioner asserts in this petition only that he was "persecuted" on account of his membership in the Muslim Brotherhood and makes no claim of having been persecuted for "political opinion."

IV. Respondent disregards the way "persecution" is defined in *Roy v. Ashcroft* in an effort to avoid the conflict which exists between the way the Fifth Circuit has defined the term and the way other courts of appeals have defined it

On page 12 of his brief, Respondent disregards the manner in which "persecution" is defined in *Roy v. Ashcroft,* 389 F.3d 132 (5th Cir. 2004). As Respondent correctly observes, "the Fifth Circuit [in *Roy*]

noted that persecution 'has been construed as requiring a showing' by the alien 'that harm or suffering will be inflicted upon [him] in order to punish [him] for possessing a belief or characteristic a persecutor sought to overcome.'" *Id.* However, Respondent then argues in the next sentence of his brief that the Fifth Circuit in *Roy* "went on to explain that this showing simply requires 'some particularized connection between the feared *persecution* and the alien's race, religion, nationality or other listed characteristic.'" *Id.* (emph. added). This is an inaccurate reading by Respondent of this part of the *Roy* opinion. Unlike Respondent asserts, nothing in the Fifth Circuit's reference to the requirement that there be a "particularized connection" between persecution and one of the five protected grounds alters or modifies the express definition of "persecution" the Fifth Circuit adopted in *Roy*.

Another problem with Respondent's analysis is its failure to recognize that the "persecution" definition set forth by the Fifth Circuit in *Roy* is exclusive. By "***requiring*** a showing" by the alien "that harm or suffering will be inflicted upon [him] in order to punish [him] for possessing a belief or characteristic a persecutor sought to overcome," the Fifth Circuit has created a litmus test which must be met in each and every case before an alien can demonstrate his entitlement to asylum or withholding relief. See *Roy v. Ashcroft*, at 138 (emph. added). This litmus test is set at such a high level by the Fifth Circuit's "persecution" definition that many aliens who could otherwise

prove a case of "persecution" in any of the other courts of appeals will be unable to prove that they were "persecuted" under this Fifth Circuit test. Respondent's assertion that "this showing [i.e. "persecution"] simply requires 'some particularized connection between the feared persecution'" and one of more protected grounds is simply not a correct or accurate statement of the law stated in *Roy*. (Respondent's brief, at 12). Nothing in the *Roy* opinion supports this contention made by Respondent. *Roy*, supra at 138.

V. Respondent's argument that the Fifth Circuit did not rely on its prior decision in *Roy v. Ashcroft* for a definition of "persecution" is without merit

Respondent asserts on page 11 of his brief that "Contrary to petitioner's suggestion (Pet. 4), the court of appeals did not rely on its prior decision in *Roy* for a definition of persecution." This argument is without merit. Respondent fails to recognize that the "persecution" definition Petitioner complains of was relied on throughout the proceedings in this case. Both the IJ and the BIA utilized the same definition of "persecution," with the BIA specifically holding that the IJ was correct in its determination that [petitioner's] single detention of 14 hours did not rise to the level of persecution. (See Respondent's brief, at 7). Respondent acknowledges that this "persecution" definition was used at the IJ level on page 5 of his brief, stating: "The IJ thus determined that '[t]he testimony and exhibits are simply insufficient to reflect that the single arrest of [petitioner] was persecution designed

or intended to overcome any belief or characteristic or belief, political or otherwise." The incorrectness of the *Roy* "persecution" definition was also specifically argued by Petitioner at pages 22-23 of his merits brief to the Fifth Circuit. Accordingly, because the record amply reflects that the Fifth Circuit based its analysis on the same erroneous definition of "persecution" that the IJ and BIA relied on in denying Petitioner relief on his withholding of removal claim – even though informed that this definition was erroneous – it cannot be said that the Fifth Circuit did not consider the "persecution" definition Petitioner complained of, as set out in *Roy*.[2]

Respondent's argument that there is no indication that the Fifth Circuit relied on the "persecution" definition set out in *Roy* is also without merit. (See Respondent's brief, at 12). As Respondent concedes on pages 2-3 of his brief, the issue of Petitioner's entitlement to withholding of removal relief necessarily required a legal determination of whether Petitioner was "persecuted" on account of a protected ground. Consequently, the Fifth Circuit had to apply some definition of "persecution" in order to address Petitioner's

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[2] Respondent's reliance on *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (see p. 12 of his brief) in arguing that the issue asserted in this petition was not before the Fifth Circuit is misguided. In *Cutter*, this Court refused to address petitioner's Spending and Commerce Clause arguments because the Sixth Circuit had confined its analysis to the Establishment Clause violation. Here, the Fifth Circuit squarely rejected Petitioner's argument that the BIA and the IJ had improperly denied withholding of removal relief by relying on an erroneous definition of "persecution."

withholding of removal claim. Respondent therefore cannot properly say that the definition of "persecution" was not an issue in Petitioner's case. The Fifth Circuit's citation to *Roy* as establishing that substantial evidence supported the BIA's determination that Petitioner was not "persecuted" is by itself strong if not conclusive proof that the Fifth Circuit relied on the "persecution" definition set out in *Roy*. (See *Roy*, at 138).

Respondent's argument further ignores the general nature of the Fifth Circuit's citation to *Roy*, in that this cite was not to a specific point of law, but general in scope. Respondent's argument also erroneously assumes that the Fifth Circuit was unaware of the "persecution" definition set forth in *Roy* when it decided Petitioner's case.

IV. Respondent, without good reason, refuses to acknowledge that in the Fifth Circuit an alien must show that harm or suffering will be inflicted upon him in order to punish him for possessing a belief or characteristic the persecutor sought to overcome before a case of "persecution" is proven

Respondent attempts but fails to undermine the validity of the Fifth Circuit's definition of "persecution" in *Roy* by citing to other language in that decision. (Respondent's brief, at 12). Although Respondent is correct in observing that not all courts of appeals have defined "persecution" as an isolated term and that some courts have included within the definition the "on account of" language set out in the

"refugee" definition of the INA, he fails to recognize that these courts of appeals, by tracking this nexus language, have provided a workable, consistent definition of "persecution." (Respondent's brief, at 13-14). The Fifth Circuit's definition of "persecution," on the other hand, stands alone. Its "persecution" definition not only fails to track the language in the asylum and withholding of removal statutes, but it imposes much more stringent proof requirements on the alien than the proof requirements its sister courts of appeals have imposed. (See, e.g., *Rife v. Ashcroft*, 37 F.3d 606, 612 (8th Cir. 2004). In these other courts of appeals, a plain meaning rule analysis is applied in determining whether relief should be granted. *Id.* The only proof needed is the proving of a nexus between the harm or suffering the alien endures and one of the listed protected grounds. *Id.* Under the Fifth Circuit's "persecution" test, however, the only type of persecution recognized is "harm or suffering . . . inflicted upon the alien in order to punish [him] for possessing a belief or characteristic a persecutor sought to overcome." See *Roy v. Ashcroft*, at 138 (emph. added).

The Fifth Circuit "persecution" definition thus imposes a completely different burden of proof than what is contemplated by ascribing a plain and ordinary meaning to the term "persecution," as used in the asylum and withholding of removal statutes. The Fifth Circuit's very narrow, yet all-encompassing definition of "persecution" therefore cannot be reconciled with the substantially similar "persecution" definition other courts of appeals have applied in deciding

whether an alien should be granted relief on an asylum or withholding claim.

CONCLUSION

The "persecution" definition adopted by the Fifth Circuit, aside from being completely different from the "persecution" definition adopted by most if not all of the other courts of appeals, imposes a burden of proof which many aliens pursuing asylum or withholding of removal claims will not be able to meet, even if they otherwise qualify for such relief. In particular, those aliens persecuted because of an immutable characteristic, such as race or nationality, will not qualify for withholding or asylum relief because they will not be able to show that the immutable characteristic they possess is a characteristic which the persecutor sought to change or overcome. This Court should therefore declare invalid the "persecution" definition adopted by the Fifth Circuit in *Roy* and in the BIA decisions Respondent cites to in his brief. Taking such action is necessary since the definition of "persecution" utilized in *Roy,* which originated from dicta in the BIA decision of *In re Acosta*, 19 I & N Dec. 211 (B.I.A. 1985), has injected considerable conflict and confusion in the body of law

relating to the way the asylum and withholding of removal statutes are applied.

Respectfully submitted,

JAMES D. LUCAS
Counsel of Record